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No. 08-41

Supreme Court, U.S.
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In The
Supreme Court of the United States

WILLIAM DUPRE,

Petitioner,

v.

TELXON CORPORATION and
SYMBOL TECHNOLOGIES, INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

On July 7, 2008, William Dupre filed his Petition for a Writ of Certiorari with this Court. In the Petition, Dupre stated that the "critical reason for this Court to accept jurisdiction is that if it does not, no other institution will prevent violations of due process that will be suffered upon many more citizens throughout the States." Pet. at p. 32. Dupre also noted that the supreme courts of the several states would not remedy the state judicial processes that allow for large contributions to judges so long as it was in their perceived self-interest to maintain them. *Id.* at 33.

On August 11, 2008, the Ohio Supreme Court, by and through its appointed Judicial Task Force, released its "Revised Proposed Rules on Conduct for Judges." *See*, Press Release, Ohio Supreme Court (Oct. 11, 2008), *available at*, http://www.sconet. state.oh.us/ Communications_Office/Press_Releases/2008/ adminications. The Revised Proposed Rules on Conduct for Judges effectively provide *de jure* approval for limitless indirect contributions by litigants to judges who preside over their cases. Put differently, rather than responding to the constitutional concerns raised by Dupre in the Petition before this Court, Ohio's Task Force has just provided a legal road map for parties who desire to avail themselves of the benefits of contributing large sums to judges whose cases will be decided by those judges.

I. Procedural History.

On February 12, 2007, the American Bar Association released its revised Model Rules for

Judicial Conduct. *See generally*, ABA's Web Site, *available at*, http://www.abanet.org/judicialethics/approved_MCJC.html. Of particular importance to the issue before this Court is an amendment to Model Rule 2.11(A)(4) and the corresponding definition of the word "aggregate." The 2007 Model Rule 2.11(A)(4) established standards for mandatory disqualification when a judge has received large contributions from a litigant. It provides as follows:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> ***
>
> (4)*The judge knows* or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year(s) made *aggregate* contributions to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or greater than $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity]

See, ABA's Model Rules, *available at*, http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf (emphasis added).

The 2007 Model Rules also defined the word "aggregate" as follows:

> "Aggregate," in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate's campaign committee, *but also all contributions made indirectly* with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate's opponent.

Id. (Emphasis added).

Approximately six months after the Model Rules were published by the ABA, the Ohio Supreme Court appointed a of group judges and attorneys to the Judicial Task Force. The Task Force was assigned the job of reviewing the proposed amendments and recommending changes to Ohio's Code of Judicial Conduct. According to the Ohio Supreme Court's web site, the process through which the Task Force, and later the Ohio Supreme Court, determined which of the proposed amendments to the Ohio Code of Judicial Code of Conduct would be approved for public comment was as follows:

> In June 2007, Chief Justice Moyer appointed the nineteen-member Task Force on the Code of Judicial Conduct. The Task Force was charged with examining the revised Model Code of Judicial Conduct that was adopted by the American Bar Association in February 2007. Beginning in August 2007, the Task Force conducted a comprehensive review of the ABA Model Code, existing Ohio Code of Judicial Conduct, case law, and advisory opinions. The work of the Task Force during the past eleven

> months produced a proposed Ohio Code of Judicial Conduct that is now being published for public comment by the Supreme Court of Ohio.

See, Ohio Supreme Court's Web Site, *available at*, http://www.sconet.state.oh.us/boards/JudConductTF/proposedJudCond/pubNoticejuly08.pdf.

Regrettably, the Task Force proceeded to strip away those provisions from the Model Code that ensured a litigant's right to an impartial tribunal would not be violated. The definition of the term "aggregate" as provided by the Model Rules was *stricken*:

> ~~"Aggregate," in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate's campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate's opponent.~~

See, Ohio's Proposed Rules for Judicial Conduct, *available at*, http://www.sconet.state.oh.us/boards/JudConductTF/proposedJudCond/terminology.pdf.

The Task Force explained that the "definition of 'aggregate' is stricken, due to the deletion of Rule 2.11 (A)(4), and moved to Rule 4.6." *Id.* Put differently, the Task Force struck the language prohibiting excessive indirect contributions because it chose to delete the very rule that would have ensured that a litigant's right to an impartial tribunal remained inviolate.

As published by the Ohio Supreme Court, Proposed Rule 2.11(A) reads:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> ***
>
> ~~(4)The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year(s) made aggregate contributions to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or greater than $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity]~~

Id. at http://www.sconet.state.oh.us/boards/JudConductTF/proposedJudCond/rule2_11.pdf.

Instead of implementing a procedure that would have allowed Ohio to comply with constitutional mandates, the Task Force deleted the rule altogether. In doing so, the Task Force indicated that "Division (A)(4) relative to the disqualification of a judge who receives a campaign contribution in excess of a specific amount, is not adopted, in part because Rule 4.4 contains what are considered *reasonable contribution limits* applicable to individuals and organizations, including parties, lawyers, and law firms." *Id.*

(Emphasis added). The "reasonable contribution limits" set forth by Proposed Rule 4.4 contain the same loophole that was exploited so brazenly in case *sub judice*.

In accordance with Ohio's Proposed Rule 4.4(J)(3)(a) & (b), a candidate for the Ohio Supreme Court can receive $275,000 from *a* political party per fundraising period, and an appellate court judge can receive as much as $60,000 from *a* political party per fundraising period. *Id.* at http://www.sconet.state.oh.us/boards/JudConductTF/proposedJudCond/rule4_4.pdf.

Setting forth the exception that then swallows the rule, Ohio's Proposed Rule 4.4(N) states that campaign contributions passing through a political party, *shall not* be "aggregated" with contributions made by individuals or organizations:

> (N) In applying the contribution limits contained in division (J) and (K) of this rule, the contributions of an individual or organization to a judicial candidate fund established by a political party *shall not be aggregated* with other contributions from the same individual or organization made directly to the campaign committee of a judicial candidate unless the campaign committee of the judicial candidate directly or indirectly solicited the contribution to the judicial candidate fund.

Id. (Emphasis added).

There are some eighty-eight counties in Ohio. Each one has a political party. As set forth in Rule 4.4(N) contributions made by individuals but through political parties are not aggregated. Exclusive of the state political parties, an individual could contribute $5,280,000 to a judicial candidate for an appellate court per fundraising period, through county parties, without running afoul of the "reasonable contribution limits" established by Proposed Rule 4.4. A candidate for the Ohio Supreme Court could receive $24,200,000 from a litigant, per fundraising period, in the same manner without violating Proposed Rule 4.4.

II. The Ohio Supreme Court's Decision Is Directly Relevant To The Issue On Appeal.

Accompanied with the knowledge that this Petition is pending before this Court, and provided with an opportunity to remedy at least one of the state procedural flaws that gave rise to this Petition, the Ohio Supreme Court elected not to reverse the aforementioned recommendations made by the appointed Task Force. The Proposed Rules are available for public comment. The Model Rules that were stricken, obviously, are not. The fact pattern currently before this Court has been effectively embraced by the Ohio Supreme Court as legally permissible.

Litigants who want to avoid campaign contribution limits need only avail themselves of the county and state political parties within Ohio. Indeed, many of the political party chairmen will prove better advocates for the litigant's position then the litigant. From the perspective of the recipients, they enjoy both the

contribution and plausible deniability. That such a system might further erode the public's faith is lamentable. That the system amounts to nothing less than *de jure* discrimination against those citizens who do not have the financial wherewithal to contribute large sums, does not appear to be a material consideration.

The vast majority of litigants within Ohio, and throughout the country, lack the financial resources to play on a field whose slant has become too steep to climb. As evidenced by Ohio's Revised Proposed Rules on Conduct for Judges, the justices who sit on the state supreme courts will not act in a manner that is contrary to their own perceived interests. Instead of leveling the playing field, they are institutionalizing the slope.

As the state supreme courts appear disinclined to guarantee that all of the players are treated fairly, the question presents itself again: How many more citizens must fall short of the goal line, not as a result of the merits of their cases, but because of tribunals that appear neither fair nor impartial? How many more citizens will have their right to an impartial tribunal violated before this Court intervenes and says no more? This issue and this case are ripe for review.

CONCLUSION

For the foregoing reasons, Dupre respectfully requests that this Court grant his Petition.

Respectfully submitted,

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